IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

Nos. .....

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, Deceased.

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, Deceased.

Sur Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

Reasons for Denying the Petition.

I. The real question these cases present has been settled by this Court.

II. The Circuit Court of Appeals has decided the

question in manifest accord with the applicable decisions of this Court; and (contrariwise),—

III. The petition neither invokes any of the reasons specified in Rule 35 concerning review on writ of certiorari of decisions of circuit courts of appeals, nor otherwise assigns valid ones.

This Court's decisions on all aspects of a question render it unsubstantial sur motion to affirm, or dismiss, hence a fortiori so sur an application for a certiorari.

Merriam Co. v. Syndicate Pub. Co., 237 U. S. 618, 621-624.
Missouri Pac. Ry. Co. v. Castle, 224 U. S. 541, 544, 545.

Imprimis, the petition and supporting brief mistakenly declare, that the court below—and the Attorneys General—have "by implication" read into the Revenue Acts an "exemption" in addition to the exemptions enumerated in the Acts—have read "into the statute an implied exemption"!

But, as the opinions all show, what, on the contrary, the court below and the Attorneys General hold, is that,—

> a specially restricted Indian tribal source is not within the *purview* of these general tax Acts, is not within the scope of Congress' intent to tax.
>
> (*Infra*, pp. 8, 9, 10.)

Such mistake, however, has been the Bureau of Internal Revenue's gratuitous man-of-straw in these cases from the beginning, and now it reappears *here* as the very thread of petition and supporting brief.

The Bureau's text also continues to confuse the two meanings of exempt—(1) "not subject to", and (2)

"excepted from the operation of"—and now means one, and now the other.

Turning therefrom to our contention, that no question of substance exists justifying a *certiorari*,—

The United States has never for its own benefit taxed its Indian wards, and it is settled that to tax their lessee of restricted Indian mineral land is to tax the Indian such that an intent to do so can not be implied from general Acts of Congress. Thus,—

I.

This Court has settled,—

(a) *That it is the Government's duty as Guardian of the Indians to make the best terms that it can for them in its negotiations to lease their mineral lands; and*

(b) *That promulgation of a tax on a prospective lessee's profits from his share of the mineral would reduce the royalty he would otherwise pay the Indians*:

1.

Gillespie v. Oklahoma, 257 U. S. 501, 504, 506:

Without any consent on the part of Congress in the premises, Oklahoma had laid an income tax on entire net income arising from all sources, and sought to hold her citizen Gillespie liable on income derived by him as lessee of restricted Osage Indian tribal oil lands from sales of his share of the oil received.

Taxing income, however, being to tax source (*Pollock v. Trust Co.*, 157 U. S. 429, and 158 U. S. 601, 618; *Oahu Ry. & Land Co. v. Pratt*, 14 Hawaii 126, 129), and these

tribal leases being under the National Government's protection as Indian Guardian (*Indian Territory Illuminating Oil Company v. Oklahoma,* 240 U. S. 522, 529), and Gillespie the instrumentality used by the United States to carry out its duties to the Osages,—

> a tax upon his profits from his leases "is a direct hamper" upon the Guardian's effort *to make the best terms that it can for its wards.*

The judgment of the Supreme Court of Oklahoma upholding such tax was accordingly reversed.

The lessee Braden, in the cases at bar, sustained precisely the same relation as did Gillespie to the Osage Indians (lessor of these same oil deposits) and to the United States as their Guardian, and under a substantially identical lease.

This Court had before it, in *Choctaw, etc., Railroad Company v. Harrison,* 235 U. S. 292, 298, an attempted Oklahoma tax in respect of a lessee's sales of *coal* produced under leases negotiated by the United States as Guardian of the Choctaw and Chicasaw Indians in discharge of its duty in respect to the opening and operating of those Indians' coal deposits.

Considering the "real nature and effect" of the tax—which is what controls (*Railroad Company v. Peniston,* 18 Wall. 5, ft. 36)—this Court striking that tax down cited, and reached the same conclusion as that in, *Missouri K. & T. Ry. Co. v. Meyer,* 204 Fed. 140, ft. 145, that such taxes

on *lessees* might deprive mineral leases *of all value to the Indians.*

Also, this Court held in *Weston v. Charleston,* 2 Pet. 449, 468, that taxing "must" affect terms, and observed, in *Jetton v. University,* 208 U. S. 489, 501, that the effect, on rent, of not taxing lessee, is something *readily seen,* just as the authorities show. *Daugherty v. Thompson,* 71 Tex. 192, 202; *Hardy v. Waltham,* 7 Pick. 108; *Seligman on Shifting and Incidence of Taxation,* 271, 272; etc.,—the burden, as the last named says, falling wholly on the landlord.

And how highly "practical" it is for Indians to have a tax-free lessee, is notably exemplified in the case of Alaskan Indians. In the negotiations on their behalf, the Secretary of the Interior insisted on an *agreement,* that if lessee were adjudged not subject to that territorial license tax, it "should pay an amount equal to the tax to the lessor", *Territory v. Annette Island Packing Company,* 6 Alaska 585, 589.

It being thus manifest and established that to tax prospective oil lessee is to tax Indian lessor,—

2.

This Court's Decisions Equally Settle the Federal Guardian's Duty in the Premises.

As ruled in *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, the Indians *depend* on the Guardian.

This Osage Nation, the United States, admittedly, received "under their protection",—the Osages acknowledg-

ing dependency. *2 Kappler's Laws & Treaties,* 2 Ed., pp. 97, 880.

As held in *Winton v. Amos,* 255 U. S. 373, 392, from this accepted dependency, the guardianship arises; and

In *United States v. Candelaria,* 271 U. S. 432, 439, it is pointed out how an unbroken current of judicial decisions have attributed to the United States the duty of exercising a fostering care and protection over all dependent Indian communities within its borders.

Osage tribal ownership of these oil deposits and dependency as a people on the Government as their Guardian, the trust and its having originated under *special* federal enactments, this property being "inalienable" in any form and subject to no form of incumbrance, and the United States' holding it in trust for the Tribe as wards of the Government and having assumed the duty to protect it against all forms of alienation or incumbrance, are all matter of admission. (R. 4 to 10, 31).

Such trust, Indians have a right to have properly administered. *Morrison v. Work,* 266 U. S. 481, 488.

Beyond question, then, to get for the Osage Indians the best terms that it can—for *their oil*—was and is the Federal Guardian's plain duty in the premises.

Such, then, the settled consequence, in negotiations for royalty, of promulgating taxation of a prospective lessee's profits from Indian oil lands, and such the settled duty,—

II.

As to the suggestion that "the courts below have taken a step in advance of anything that the Attorney General has decided", it is, on the contrary, submitted that what both Courts and Attorneys General hold is no more than what this Court's beadroll of decisions has clearly foreclosed, to-wit, that,—

No intent to tax Indian wards or lessees of their mineral can be implied from general Acts of the Congress of the United States:

1.

The pertinent principles so laid down thus analyze,—

That, with respect to any subject,—Congress, having deliberately dealt with it *specially*, is presumed not to call it to mind in a later *general* Act where not expressly mentioned.

Rodgers v. United States, 185 U. S. 83, 87, 88, 89.

That,—Indian status is peculiarly within the principle, the "generality" of terms of the present Revenue Acts, as to income "from any source", not being a whit more sweeping than in the statutes in the following two cases, which, though "literally" embracing Indians, were adjudged not to be meant to include them.

Washington v. Miller, 235 U. S. 422, 427;
Frost v. Wenie, 157 U. S. 46, 58, and 59.

That, statutes levying taxes (a) are not extended

by implication, (b) are construed against the Government, and (c) in favor of the Indians.

United States v. Field, 255 U. S. 257, 262;
Gould v. Gould, 245 U. S. 151, 153;
Choate v. Trapp, 224 U. S. 665, 675.

That, Indian "restrictions" are impersonal, being laid on the land which it is the Government's duty to preserve against alienation.

Bowling v. United States, 233 U. S. 528, 535.

And, that it is no part of a Government's policy to tax its own instrumentalities for its own purposes.

Mercantile Bank v. New York, 121 U. S. 138, 162;
United States v. Rickert, 188 U. S. 432, 437, 438.

2.

Standing on this Court's decisions, the Attorney General, on Mar. 20, 1925, held, and the Secretary of the Treasury on Sep. 15, 1925, approved, that—no reference being made to Indians or their property in these same general Revenue Acts—*Quapaw* mineral income from specially restricted lands is not *within the purview* of those Acts because of the "inalienability" of the source, that,—

(a) "Inalienability and nontaxability should go hand in hand, at least until Congress clearly provides otherwise"; and

(b) That he could not by implication impute to Congress under *the broad language of these Acts* "an

> intent *to impose a tax* for the benefit of the Federal Government on *income* derived from the restricted property of these wards of the nation * * * In other words, it is not lightly to be assumed *that Congress intended to tax the ward for the benefit of the guardian".* (Italics ours). 34 *Op. Atty. Gen.* 439, 445.

The Osages' specially restricted property is likewise "inalienable" (R. 7), and so tax-free (*Kansas Indians,* 5 Wall. 737, 760), and their being still in tribal status (R. 6) makes it the clearer. And, in the cases at bar, defendants filed statutory demurrers, so that it is *admitted,* that as late as *1925* Osage minerals were *still* "inalienable" (R. 1, 7, 31)—hence, in that regard, admittedly, unaffected by the anterior Acts of 1916-17-19-21.

On June 24, 1926, the Attorney General advised that intent to tax income of Hopi tribal Indians "can not be assumed from the general provisions of the internal revenue laws, although broad in compass," that a dependent tribe does not come within their *"purview".* (To be reported as 35 *Op. Atty. Gen.* 107, 109).

How specious, the Bureau's view that the Attorney General reached his conclusions "by reading into the statute an implied exemption"!

What, on the contrary, Attorneys General, as well as Circuit Court of Appeals, discerned was, that the restricted source is not among those embraced by the taxing terms of the Acts, which is of course a very different thing from the generality of statutory terms including a subject

and its then being by an exemption taken out of their operation.

3.

Equally with Attorneys General, the Circuit Court of Appeals' conclusions were not other than as established by this Court's decisions, *supra,* namely,—

(a)

That, "any source," in these same *general* Acts, does not embrace restricted lands of a *domestic dependent nation* (*Cherokee Nation v. Georgia, supra*), the trust estate of the Government's wards which it has *specially* assumed the duty to protect (R. 7 and 31); particularly so (*U. S. v. Nice*, 241 U. S. 591, 599), when, uninterruptedly, Indian tribal properties have always been federally administered without tax or other benefit to the United States.

(b)

That, to tax income is to tax source, *Pollock v. Trust Co., supra.*

(c)

That, if, during the negotiations between prospective lessor and lessee over the *division* of probable mineral production, Oklahoma or United States (it makes no difference to a bargaining lessee which of them it is) announce an intention to take a share of the oil *for themselves* (in addition to that of the In-

dians), they at once reduce what the lessee could, or would, otherwise pay the Tribe:

As the Gillespie case makes plain, it is no "theoretical" matter (p. 506)—the hamper is "direct", and *that,* in its economic effect on the effort to make terms.

(d)

That, (as urged sur Five Civilized Tribes, 34 Op. Atty. Gen. 272, at 285), reasons on the ground of duty to the Indians impelling Congress to withhold consent to *Oklahoma's* taxing lessees' profits from tribal minerals are just as cogent—not as to the *power* —but as touching the *intention* of the fiduciary not to do the very same thing itself;

That, what on the score of duty, the Guardian did not let Oklahoma do, it has not itself done *impliedly.*

Unable to question the above, petitioners ignore it, and turn to the inconsequential:

III.

Petitioners' Positions.

1.

To the suggestion, that the Gillespie and like cases concern *State power* to tax tribal lessees' profits,—

(a) The ground of those decisions is *not* lack of State power to tax, but lack of *federal consent* to

State exercise of power (*Jaybird Mining Company v. Weir,* 271 U. S. 609, 613; *Childers v. Beaver,* 270 U. S. 555, 559);

(b) It was not just because it was *Oklahoma* that was doing the taxing of profits of lessees of Indian coal and oil. It was because of the *effect* of that sort of taxation in the light of the guardianship; and

(c) In a matter as to the federal Guardian's *intent* to exercise its own powers, its recognition of its duty in the premises by interfering with another sovereign's exercise of its power is highly relevant.

Thomas v. Gay, 169 U. S. 264, "obviously is more remote", as the Gillespie case rules (p. 506).

Metcalf v. Mitchell, 269 U. S. 514, 519, 522, concerned (a) the meaning of an express exemption from the operation of the 1917 Act's general taxing words, and (b) Congress' taxing a State instrumentality. The effect, on the State, of that consulting engineer's being within the purview of that federal Act was remote, and was adjudged so in *avowed contrast* to the Oklahoma Indian cases, *supra.*

2.

As to the Bureau's espousal now of the eight-to-six view of the Board of Tax Appeals in *Appeal of Leah Brunt* —in preference to the opinions of the Attorneys General,—

(a) That decision was on Feb. 2, 1927, directly overruled by a final judgment entered by Judge Cotteral of the District Court of the United States for

the Western District of Oklahoma in the unreported case of *October Pearson v. Alexander, Collector,* Case No. 172, never as yet (Apr. 25, '27) appealed from;

(b) The Board, misconceiving the Osage Allotment Act's stating *when* surface tax-freedom should *end* as an "exempting" from taxation, fallaciously inferred that the Act had opened to taxation the subsurface deposits, which, *admittedly,* are "inalienable" *still* (R. 7); and

(c), In relying on *Cherokee Tobacco,* 11 Wall. 616, overlooked *U. S. v. Forty-three Gallons of Whiskey,* 108 U. S. 491, 497, 498.

3.

Concerning petitioners' "Reasons"—*co numero,*—

(I.)

No one has read an exemption into the statutes (see pp. 2, 3 and 9 *supra.*); and

It is *not*—as permeates the Bureau text—that Congress "intended by the Acts to exempt" from their operation a source otherwise within their scope; but this restricted Indian source, *already* (specially) "exempt"—to use Bureau terminology—Congress did not mean to *include.*

(II.)

Petitioners' second reason is equally without merit.

The Circuit Court of Appeals, having thus held that taxes exacted on Braden's income as lessee of restricted

Osage tribal lands had been illegally collected, ordered their return. So much as he had paid before he died, he paid under protest *and duly filed and pressed his claim for refund therefor.* (Exh. A of earlier, or Lewellyn case, and Stipulation, identical with present record at R. 17 and 34, not printed because of R. 94). As to taxes paid after his sudden death, his Executors did likewise, suing herein promptly after the prerequisite of Bureau denial of refund (R. 17 and 34).

The amount of other possible refunds is not germane, either to the question of the Revenue Bureau's authority to collect such taxes or the Government's right to retain them.

(III.)

To petitioners' apprehensions as to the future operation and effect of the decision herein, the answer is that the policy to date of not bringing income from restricted Indian lands into the field of general taxation, confirmed below, still depends, as always, on express Congressional action seeking to serve not only the Government's material welfare but its fiduciary duty to a dependent people.

That the policy has benefited the Osages is evidenced by the fact that *their leases pay a much higher return in royalty for more limited rights* than the ordinary commercial lease in the same (mid-continent) field. (R. 11, 12 and 13; ft. 32).

It is *not,* therefore, as petitioners now suggest, "altogether theoretical and not practical". The Indians do enjoy greater royalty because of their lessee's not being taxed on income derived from their lands.

Braden's payment, as aforesaid, under protest of taxes on his income from Osage mineral and his prompt filing of

claim for refund equally confute petitioners' irrelevant supposition as to what he thought, when negotiating, as to any income tax liability, even were the question one as to the mental attitude of a lessee instead of the meaning of Acts.

4.

Driven by the decisions and the opinions of the Attorneys General, petitioners in their brief virtually concede that income from the oil in the Indians' hands has *not* been taxed, and that the Bureau's interpretation of the Acts would affect the royalty all Indians would *hereafter* get on their oil and gas and coal, but in their assignment intimate that, Braden having once bound himself, no subsequent *taking* of taxes from him could operate to abate the royalty of his covenant to pay by their *now* being shifted to the Tribe:

(a)

The cases at bar concern, *not* the obligation of a lease, but the scope of legislation.

It is not how a contract, once entered into, *binds,* but *what Congress meant by its Acts.*

They are the same Acts,—the scope petitioners would thus concede for tomorrow was the scope from 1916 on.

(b)

Neither is it a matter of *taking* taxes after a contract has been signed, but of their promulgation during its negotiation.

Gillespie had made *his* contract.

The "direct hamper" is *before signing*—is upon the

effort to make "terms", and is, of course, in respect of negotiations with any lessee.

Granted the income was Braden's, who was bound to pay royalty as stipulated, it was never a question of taxing his income as such, but of the nontaxing, in the 1916 and subsequent Acts, of income (whosesoever it might be) derived from restricted Indian lands demised under federal guardianship.

It is submitted,—

(a) That these cases are ruled by the decisions, *supra,*—that, Congress (because of a duty to get the Osage Indians full royalty) not having consented to a State's taxing their lessees' profits—which for a Guardian to do, would be the last thing to be presumed—no such intent can be *implied;*

(b) That, if the cases were pending on motion to affirm or dismiss, such motion would properly prevail. Hence the petition should be denied.

Respectfully submitted,

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